

**IN THE DISTRICT COURT IN AND FOR PUSHMATAHA COUNTY  
STATE OF OKLAHOMA**

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DALE JACKSON, JUSTIN JACKSON,	)	
DEBBIE L. LEO DBA MILLER LAKE	)	
RETREAT LLC, LARINDA MCCLELLAN,	)	Case No. _____
LOUISE A. REDMAN TRUST,	)	
WALTER MYRL REDMAN,	)	Assigned Judge:
AND KENNETH ROBERTS,	)	
	)	
Petitioners,	)	
	)	
v.	)	
	)	
THE OKLAHOMA WATER RESOURCES	)	
BOARD	)	
Respondent.	)	

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**PETITION FOR JUDICIAL REVIEW**

COMES NOW Petitioners Dale Jackson, Justin Jackson, Debbie L. Leo dba Miller Lake Retreat LLC, Larinda McClellan, Louise A. Redman Trust, Walter Myrl Redman, Kenneth Roberts, and Diane Smith (“Petitioners”), by and through its attorney of record, Kevin R. Kemper of Norman, Oklahoma (“Counsel”), allege as follows against the State of Oklahoma Water Resources Board (“OWRB”) and (“Respondent”). Petitioners request this Court to provide judicial review of and overturn the OWRB’s decision on October 10, 2017, to grant a permit (“Permit”) for the City of Oklahoma City (“City”) to divert stream water from the Kiamichi River because of various violations of state law. Title 75, O.S. §§ 318-323. Petitioners pray that this Court should set aside or reverse the Permit, or in the alternative, remand the case for the OWRB to receive and consider more evidence. *Id.* at § 322(2).

1. The Kiamichi River and certain tributaries run directly through Pushmataha County, among other adjacent counties, giving this Court jurisdiction and venue. *Id.* at §318(B)(2).

2. Petitioners own property and have riparian rights in Pushmataha County along the Kiamichi River and certain tributaries, and most reside upon that property, giving this Court jurisdiction and venue.. *Id.* at §318(B)(2).

3. The City of Oklahoma City filed for an Application for a regular permit with the OWRB to divert stream water from the Kiamichi River. Permit Application No. 2007-0017.

4. On or about October 10, 2017, the Respondent granted the Permit. *See* attached Exhibit 1, “Findings of Fact, Conclusions of Law and Board Order” (Oct. 10, 2017).

5. This Petition for Judicial Review has been filed within thirty (30) days of the Final Order. 75 O.S. § 318(B)(2).

6. This Court may set aside or reverse the Final Order if it finds the substantial rights of the appellant or petitioner for review have been prejudiced because the agency findings, inferences, conclusions or decisions, are:

- (a) in violation of constitutional provisions; or
- (b) in excess of the statutory authority or jurisdiction of the agency; or
- (c) made upon unlawful procedure; or
- (d) affected by other error of law; or
- (e) clearly erroneous in view of the reliable, material, probative and substantial competent evidence, as defined in Section 10 of this act, including matters properly noticed by the agency upon examination and consideration of the entire record as submitted; but without otherwise substituting its judgment as to the weight of the evidence for that of the agency on question of fact; or
- (f) arbitrary or capricious; or
- (g) because findings of fact, upon issues essential to the decision were

not made although requested.

*Id.* at § 322(1).

7. Petitioners argue that all of the above facts apply to the Respondents' decision to grant the Permit, and that Petitioner's rights were prejudiced thereby.

8. Pressure to approve this Application due to the expense of past litigation and the State of Oklahoma, Choctaw Nation of Oklahoma, Chickasaw Nation, City of Oklahoma City Water Settlement of August 2016 ("Tribal Agreement") provided an undue influence on the OWRB. *See* Final Order at 1 n. 1.

9. Therefore, Plaintiffs do not believe that they had, or could have received, a fair decision from the OWRB.

10. Plaintiffs take exception to paragraphs 6 and 52 of the Final Order, which imply that publication in local newspapers satisfies the constitutional protections of due process and notice, despite OWRB regulations at 82 O.S. § 105.11 and OAC: 785-20-5-1, as Applicant could have identified and served each and every property owner in the Kiamichi River basin. *See, e.g., Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 70 S.Ct. 652, 94 L.Ed. 865 (1950); OKLA. CONST. § II-7.

11. Plaintiffs take exception to paragraph 14 of the Order because the Kiamichi Basin Hydrologic Model fails "to satisfy OWRB stream water rules and statutes for permitting in the basin."

12. The OWRB regulations – a part of the Oklahoma Administrative Code as passed by the Oklahoma Legislature – state:

For direct diversions from a stream, the determination of water available for appropriation shall take into consideration the mean annual precipitation run-off in the watershed above the point(s) of diversion, the mean annual flow, stream gauge measurements,

domestic uses and all existing appropriations and other designated purposes in the stream system. The Board may consider other evidence or laws relating to stream flow or elevation, including but not limited to apportionment provisions of interstate stream compacts to which the State of Oklahoma is a party and the Oklahoma Scenic Rivers Act.

OAC § 785:20-5-5(a)(1).

13. The Kiamichi Basin Hydrologic Model uses different criteria – and data from the 1920s-1970s – to make decisions about availability of water in the 21<sup>st</sup> Century, even though the OWRB is required to use current studies within five years of the date of the decision to assess water availability and impacts upon certain uses. *See* OAC 785: 20-5-6(b).

14. Plaintiffs take exception to paragraphs 18-23 of the Final Order, as the burden of proof rest squarely on the Applicant, ~~and not by~~ Plaintiffs, as to whether water is available.

15. OWRB's decision, based upon a faulty burden of proof, is, at best, arbitrary and capricious.

16. Oklahoma law mandates accurate evidence be gathered before a decision may be made about the availability of water in the Kiamichi Basin.

17. OWRB and Applicant incorrectly determined availability solely upon the amount of water and not upon the effects upon the environment and beneficial uses relating to that water.

18. Upon information and belief, there is evidence on water availability in the Kiamichi Basin that already has been gathered through institutions including Oklahoma State University and the U.S. Geological Survey, and which was known to

the OWRB prior to its hearing, which was not made available to Plaintiffs or presented during the hearing or to the Board prior to their vote on the Permit.

19. Plaintiffs take exception to paragraph 41 of the Final Order, which states that the 50 cubic feet per second (“cfs”) bypass and the 20,000-acre-feet per year set-aside are protective or domestic and appropriative in-basin use during dry and low-flow years. In order to protect downstream users and the environment, the bypass must be constant and not just when water is being diverted.

20. Diverting water during times of drought with 50 cfs downstream flow is insufficient to ensure the rights of downstream users.

21. Plaintiffs did, in fact, give an alternative for calculating water – the mandatory definition in OAC § 785:20-5-5(a)(1).

22. Moreover, the appropriation could drain the Kiamichi River and the deleterious effects are not accounted for as part of the calculations.

23. Yet, this Permit process will *not* consider adequately specific concerns about endangered species and beneficial uses.

24. The Oklahoma Supreme Court has required the consideration of environmental factors when the OWRB considers a permit application. *Franco-American Charolaise, Ltd. v. Okla. Water Res. Bd.*, 855 P.2d 568, 575n40, 1990 OK 44 (Okla. 1990).

25. The Court summarized the law:

The OWRB shall approve the ... appropriation only if it finds there is surplus water after providing for 1) all prior appropriations; 2) all riparian uses perfected under the 1963 amendments; 3) all riparian domestic uses; 4) all riparian uses approved as reasonable on remand; and 5) all anticipated in-basin needs.

*Id.* at 578.

26. Reasonableness is a question of fact:

Factors courts consider in determining reasonableness include the size of the stream, custom, climate, season of the year, size of the diversion, type of use and its importance to society (beneficial use), needs of other riparians, location of the diversion on the stream, the suitability of the use to the stream, and the fairness of requiring the user causing the harm to bear the loss.

*Id.*, quoting RESTATEMENT (SECOND) TORTS §850A (1979), <http://1.next.westlaw.com>.

27. This is further explained in another treatise as a way of working out the effects that the appropriation would have “upon society, the economy and the environment” – that is, reasonableness is the final test. 7 AMR. L. OF TORTS § 21:19, <http://1.next.westlaw.com>.

28. The OWRB’s decision violates Oklahoma law if it fails to take into account beneficial uses sufficiently.

29. The law says.

(1) In considering the amount of water requested, the Board may review the efficiency of the works proposed to place the water to beneficial use and may order modifications to such works or that different works be utilized. (2) For a proposed public water supply or municipal use, the Board may review population projections for the area served or proposed to be served by the applicant.

OAC § 785:20-5-5(c).

30. The OWRB Regulations define beneficial use as “the use of such quantity of stream or groundwater when reasonable intelligence and reasonable diligence are exercised in its application for a lawful purpose and as is economically necessary for that purpose.” *Id.* at § 20-1-2.

31. Moreover, they also “include but are not limited to municipal,

industrial, agricultural, irrigation, recreation, fish and wildlife, etc.” *Id.*

32. Therefore, Plaintiffs take strong exception to paragraphs 54-56 of the Final Order.

33. The Final Order puts great emphasis on the phrase that “such contentions either are not supported by the record, not supported by the law, or are beyond the scope of the Board’s jurisdiction in this proceeding, and therefore should not be addressed by the Board.” *See* Final Order (Exhibit 1) at 10, ¶56.

34. This Court needs to determine and specify which description – the record, the law, or beyond the scope – applies to which contention. Absent such information, the Final Order (Exhibit 1) is arbitrary and capricious on its face

35. Plaintiffs provided testimony by and research from a recognized scholar that endangered species of mussels are imperiled by further reductions in in-stream flow of the Kiamichi River.

36. Granting of the permit violates federal law by taking an endangered species. *See* 16 U.S.C. § 1531 *et seq.*

37. The term “beneficial use” was applied to the stream diversion in paragraph 42 and 49 of the Final Order (Exhibit 1), yet analysis was focused on domestic and appropriated uses rather than beneficial uses.

#### **PRAYER FOR RELIEF**

38. Petitioners request this Court to overturn, set aside, or reverse the decision by the Oklahoma Water Resources Board to grant the City of Oklahoma City from a Permit to take any water from the Kiamichi River basin, or in the alternative,

to remand to the OWRB with instructions and further proceedings consistent with Oklahoma law.

39. Petitioners further pray that the Court grant Plaintiff a judgment for reasonable attorney fees in this action, to which Petitioners are entitled upon successful determination or action on the merits, and upon which an attorney's lien is claimed. 12 O.S. §696.4.

40. Petitioners request oral hearing and written briefs. 75 O.S. § 321.

40. Petitioners further pray for any and all relief not mentioned here that would provide relief and otherwise fulfill the rights of the Petitioners.

WHEREFORE, premises considered, Petitioners pray this Honorable Court grant the aforementioned relief as requested. Petitioners reserve the right to supplement and/or amend this pleading if necessary to conform to any subsequently ascertained evidence.

RESPECTFULLY SUBMITTED this 8<sup>th</sup> day of November, 2017.

*Kevin R. Kemper*

BY: \_\_\_\_\_

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**CERTIFICATE OF MAILING**

This is to certify that on or about the day of filing, a true and correct copy of the above and foregoing was sent via Certified United States Mail, postage prepaid, with Return Receipt requested, to the following:

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\_\_\_\_\_  
KEVIN R. KEMPER

**VERIFICATION**

I, \_\_\_\_\_ as Petitioner so hereby affirm under oath that the statements above are true to the best of our information, knowledge, and belief.

\_\_\_\_\_  
DATE

\_\_\_\_\_  
SIGNATURE

\_\_\_\_\_  
NAME

STATE OF OKLAHOMA        )  
  )  
COUNTY OF PUSHMATAHA    )

ss.

Subscribed and sworn before me this 8<sup>th</sup> day of November, 2017

\_\_\_\_\_  
NOTARY PUBLIC

My Commission Number: \_\_\_\_\_

My Commission Expires: \_\_\_\_\_

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COUNTY OF PUSHMATAHA    )

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SIGNATURE

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  )  
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ss.

Subscribed and sworn before me this 8<sup>th</sup> day of November, 2017

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